

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

BED BATH & BEYOND, INC.

and

Case No. 22-CA-080407

SEGUNDO ESCOBEDO, An Individual

Michael Silverstein, Esq., Counsel for the General Counsel.
Edward Jeffrey, Esq., *Jackson Lewis, LLP*, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on October 24 and 25, 2012¹ in Newark, New Jersey. The Complaint herein, which issued on August 30, and was based upon an unfair labor practice charge that was filed on May 7 by Segundo Escobedo, alleges that in about February or March, Bed Bath & Beyond, herein called Respondent, interrogated employees about their union activities, and the union activities of other employees, and on about April 20 Respondent terminated Escobedo because of his union and protected concerted activities, in violation of Section 8(a)(1)(3) of the Act.

I. Jurisdiction

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Facts

The Respondent operates a warehouse in Port Reading, New Jersey, herein called the facility, employing approximately one thousand individuals on three shifts; most of the employees at the facility are Spanish speaking. Escobedo had been employed at the facility since September 2009 in the cycle count department on the 7 a.m. to 3 p.m. shift; there are twenty five to thirty employees in his department. He operated a "Lotus Picker," which is similar to a forklift, carrying pallets with merchandise to different departments in the facility. His supervisor was Yesinia Placencia and the manager of his department was Isaac Anthony. Escobedo was terminated on about April 19; Counsel for the General Counsel alleges that he was terminated because he was one of the employees who distributed authorization cards for United Food & Commercial Workers, Local 888, herein called the Union, while the Respondent contends that he was fired because of a threat he made to a fellow employee, Christian Coller, on April 18, in the presence of a supervisor and manager. In addition, it is alleged that Respondent, by its warehouse manager, Diana Orozco, in about February or March, interrogated employees (actually, Escobedo) about their Union activities and the Union activities of other employees, in violation of Section 8(a)(1) of the Act.

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2012.

Escobedo was the only witness testifying for Counsel for the General Counsel, and he testified about signing an authorization card for the Union, as well as soliciting other employees at the facility to sign cards. He testified that his Union activity began in about October or November 2011, when fellow employee, Juan Alegre, spoke to him about the Union while they were in the internal lunchroom.² He gave Alegre his telephone number and address and that weekend he was visited at his home by Jennifer Heysoll, a Union representative. She spent a few hours with him telling him what the Union could do for the employees, and told him that she would give him Union pamphlets to distribute to other employees and asked him to notify other employees of upcoming Union meetings. He estimated that from November 2011 to the date that he was fired there were approximately twenty or twenty five Union meetings, all at a bakery in Perth Amboy, New Jersey. The meetings, held weekly, biweekly or every three weeks, began with about twenty five employees attending, with increased participation over time. From that time, until his termination, he spoke to employees about the Union before or after work and during lunch or break time, at the entrance to the warehouse in the parking lot, in the inside dining room, or in the bathroom. He estimated that during this period he spoke to about two hundred fifty employees and gave them pamphlets about the Union and papers containing the Union name, Heysoll's name, and the date and location of the next Union meeting, and gave them literature to distribute to other employees. In addition, about twenty to twenty five employees came to his house, where he talked to them about the Union, and told them what the Union could do for them. Further, employees called him to speak about the Union, and he called employees to tell them of the advantages of joining the Union. Escobedo signed an authorization card for the Union on February 11, the date that the Union began soliciting authorization cards. From that date until the day he was fired, he distributed Union authorization cards to other employees, some in large numbers for the employees to distribute, and some individually for the employees to sign. When he was given these cards to distribute, he was told to be careful that he wasn't observed by the bosses, or he could get fired, and he repeated this message to the employees to whom he gave cards to be distributed. He distributed these cards in the parking lot, in the internal dining room, and at his home, before or after work, during break, or on days off. He estimated that he gave authorization cards to ten to fifteen employees in the parking lot, about one hundred employees in the lunchroom, and about thirty to forty at his home. After receiving the signed authorization cards, he gave them to the Union.

Escobedo testified that Heysoll came to the facility on two occasions to speak to the employees, in March or April. On these occasions, she was standing in a walkway that leads to Respondent's parking lot. He knew that she would be there that day, and told about thirty employees that, if they wished to do so, they could speak to her at that time. Heysoll was wearing a yellow polo shirt with the Union's logo and initials. When he went to speak to her, there were ten or fifteen other employees with her. He spent about ten to fifteen minutes with her and, while there, he saw "Mr. Earl," an alleged supervisor in the receiving department, sitting in his car nearby.

Escobedo testified to a number of conversations with managers and supervisors regarding the Union, the first of which is alleged to violate Section 8(a)(1) of the Act. He testified that on about February 20, he was in front of the offices of Orozco, the manager of the Putaway Department (and an admitted supervisor and agent of the Respondent), and Alfonso Rangel, who he testified is also the manager of the Putaway Department. Rangel had a blank Union authorization card in his hand with an "X" marked on it, and Orozco "...asked me if I recognized

² There are two dining rooms at the facility; the larger one is at the entrance to the building, while the smaller one, which Escobedo usually referred to as the inside or internal dining room, is inside the facility.

this card or am I giving out this card.” He testified that he did not respond to her question because she was pregnant and he did not want her to have “a bad time.” Rangel then said, “Take a look at this card and ,make sure you notice it and tell your manager if you think you can talk about it.” He also said that Bruce Silverman, then the Warehouse Director, wanted to know who was involved with the Union. He testified further that about a week or two later he had a conversation with Anthony the manager of Inventory and Control, and Antonio Raqueno, not further identified. Anthony was talking in English and Raqueno was translating into Spanish. They said that they had a message from Silverman: he should not let the Union deceive him. Everything that the Union was promising was a lie and they only wanted the employees’ money. They also asked if he knew who was helping the Union and, if he knew, he should tell Silverman. The affidavit that he gave to the Board does not say that Anthony and Raqueno asked him if he knew who was helping the Union. (This conversation, as well as the next one, is not alleged as an unfair labor practice). The third conversation, with Anthony and “Javier,” a systems manager in the Inventory Department, took place in the warehouse about two weeks later. Anthony spoke in English, and Javier interpreted in Spanish. They said that there were about a thousand employees at the facility and that if you multiply that by \$30 or \$38, if the Union came in “it’s a whole bunch of money.” They also said that the employees shouldn’t let the Union deceive them, that the Union was going to take their money and Silverman was worried about that. They also said that Silverman “...wanted to know who was involved...with the Union and that I should please let him know if I know something so that this could finish once and for all...” Escobedo told them that if he knew anything, that he would tell them, they shook hands and left. The affidavit that he gave to the Board does not say that Silverman wanted to know who was involved with the Union, and that Escobedo should tell them who was involved.

Orozco testified that she learned of the Union organizing campaign early in 2012; at about that time, the Respondent “brought a team to train us how to talk to the associates about the Union.” She testified that it was an extensive training where “...they explained to us the dos and don’ts that we cannot do to the associates...we were not allowed to ask them questions about the Union. We cannot spy about the Union. We cannot threaten an associate about the Union.” During these training sessions, the trainers never asked the managers who they believed was supporting the Union. She testified that the managers were instructed to speak to employees in their group, but as his supervisor was on vacation at the time, she spoke to him; Rangel was with her at the time. She showed him (and the other employees in her group) a flier with a reproduction of a Union authorization card with an X across the top. She said that this is what a Union card looks like and told him how a union works and the fees that they charge. He replied that, “he didn’t have time for any of those things” because he had two full time jobs. So she told him, “Okay, just keep the flier, we’re giving it to all associates.” That was the extent of her conversation with him. She did not ask him whether he was distributing Union cards, if he knew who was, or if he recognized the card.

Ana Schnauffer, a Senior HR Manager for the Respondent, testified that she learned of the Union’s organizing campaign in about February. At about that time, the law firm representing them provided training for all their managers of the dos and don’ts during a union campaign, and they sent campaign literature to the employees. As part of this training, the managers were told that they were not allowed to question employees on whether they wanted a union and they were not allowed to spy on meetings.

Coller testified that he signed a Union authorization card that was given to him by Escobedo, but he could not remember when he signed the card, whether it was days or a month prior to April 18. Escobedo approached him while he was working and said that he had a union card for him to sign, that the Union was good and could increase their pay. He also told Coller to

talk to the other employees who were from Puerto Rico about the Union. It appeared to Collier that Escobedo was one of the employees who was “in charge” of bringing in the Union; other employees referred to him as the president of the Union.

The Respondent began holding meetings with the employees a few weeks after the Union began its organizing campaign at the facility. These meetings, with small groups of employees, took place two or three times a week. Nothing said at these meetings is alleged to violate the Act. Escobedo testified that at the first meeting, Silverman showed the employees a Union card with a X written over it, and said that signing the card was like signing a blank check, “and that it’s everyone’s own decision.” However, he testified that Silverman also said that he wanted to know who was the one giving out the cards, and that he would soon find out. Schnauffer testified that at meetings of employees conducted by Silverman, she translated what he said from English to Spanish. She and Silverman were given a script to read and “we were instructed to stay to the script,” which they did. They did not say that the company wanted to know who was giving out Union cards, and that the company would soon learn who was doing so.

The event that precipitated Escobedo’s termination occurred on April 18. The facts of the incident that lead up to the meeting in Orozco’s office and his subsequent termination are not disputed; what occurred in Orozco’s office is disputed. In addition, Respondent defends that he was terminated solely for his actions on that day, not for any work related problems. As part of their jobs, both Escobedo and Collier use forklifts which transport merchandise on pallets.

Escobedo testified that he and other employees were separating merchandise and placing it on pallets to be returned to its proper location at a later time. Shortly before the 9:30 break he parked the pallet adjacent to the inside dining room. A few minutes before the break, Collier drove his forklift and pallet and tried to park it on the side of the dining room, even though the area already contained four pallets and there was no space for his pallet. However, he tried to force his pallet in the area causing merchandise from Escobedo’s pallet, and another pallet to fall to the floor. Escobedo told Collier to fix the pallets and that he should be more careful, and Collier pushed the pallets again, causing more products to fall. Escobedo walked up to Collier and said, “Look what you’re doing, please pick it up.” Collier responded, “I’ll do what I want,” and Escobedo said that he was going to go to Collier’s manager to tell her what had happened. He then went to Orozco’s office and told her what had occurred with the pallets and what Collier had said, and Orozco said, “Let’s go over there.” He and Orozco walked to the inside dining room, and she told him to go inside and take his break, and she would discuss the matter with Collier afterward. He went into the dining room and Collier said loudly that “we were Satan and we were against him.” As Collier was leaving the dining room, he looked at Escobedo and said, in a loud voice, “I’m not afraid of you. Go ahead and complain wherever you want.” A supervisor, Placencia, was present in the dining room at that time, and Escobedo said that she should do something about what had occurred, and she replied, “I’m not going to eat shit for anybody.” Escobedo then left the dining room and met with Jose Aguirre, Collier’s supervisor and told him what had occurred, and he said that he knew about it and that he had sent Collier to Orozco’s office, and he told Escobedo to follow him to Orozco’s office to explain what happened earlier. They walked into Orozco’s office, Aguirre in front of Escobedo; Orozco was sitting at her desk, and Collier was standing next to the desk. Aguirre was standing between him and Collier, who were about two and a half feet apart. Escobedo told Orozco that Collier had called him a Satan in the dining room, said that he wasn’t afraid of him, and that he could complain to whomever he wanted; “at the end of the conversation I said this man is provoking me to punch him” and Collier said that he wasn’t afraid of him, and Escobedo said that he wasn’t afraid of Collier. When he was talking, Escobedo was leaning toward Orozco, and he “got up” and looked at Collier, while Aguirre was standing between them. Both Orozco and Aguirre told them to calm down, which

they did, and Aguirre left the office. Orozco then told Collier, “I don’t want to know anymore about this. You are going to go and fix the merchandise and move your machine, and I don’t want you to ever park there again.” Collier then left the office and Orozco, again, told Escobedo to calm down and that he should try to be patient because Collier was trying to rehabilitate himself, and he wouldn’t park in that spot anymore. Escobedo told her to excuse his tone of voice as she was pregnant. He returned to work, and about two hours later Orozco asked him to come to her office to prepare a statement about what had happened earlier with Collier in her office, which he did.³

On the following day Escobedo was paged to report to the security department at the facility, which he did. When he got there, he met with Raquena, who told him to see “Elsa” from the security department, who told him that she wanted to know what happened on the prior day with Collier, and he filled out a statement for her, as well.⁴ He told her that he had prepared a statement for Orozco, but she said that he had to fill out a statement for the security department, which he did. Afterward, he went for lunch and as he was leaving the dining room he was paged to report to the main entrance. When he got there, he met with “Alfonso,” who took him to the human resources department, where he met with “Mr. Nestor,” who told him that they decided to fire him. Escobedo explained that he was the person who was abused and asked, “I’m the one who is fired. How is that?” Nestor said that he was sorry, and asked him for his ID. Escobedo asked if Collier was being fired, and he was told that he was the only one who was fired.

There is also some testimony that Escobedo referred to Collier as a “Boricuas,” an allegedly derogatory term for people of Puerto Rican ancestry. Escobedo denies having used that term or referring to “you people” or “those people” in talking about Collier or other Puerto Ricans.

Orozco testified that on the day in question, Escobedo came to her office complaining that Collier moved two of his pallets from in front of the dining room in order to park his forklift there. She told him to take her to the area, which he did and he showed her where Collier parked his forklift after moving the pallet and said that the merchandise fell to the floor and that Collier put it back on the pallet and took his break. She told him to take his break and that she would call him to the office after the break and they could discuss the incident at that time, and she returned to her office. At the conclusion of the fifteen minute break she paged Collier to come to her office. When he arrived a few minutes later, she told him what Escobedo had said about what he did and she asked him why he parked his forklift next to the dining room, and he said that he did it because it was close to the cafeteria. She then told him to put the pallets back to where Escobedo originally had them, and that he was not to park in that area again. He said that he would fix it, and he left the office. A few minutes later, Aguirre, one of the supervisors working under her authority, came into her office with Escobedo and Collier, saying that Escobedo complained about Collier and the pallets. When they came into the office, she was sitting at her desk, Aguirre, sat on the other desk in the office, and Collier and Escobedo were standing on the other side of her desk, about two feet apart. Orozco told them that she had already spoken to Collier about the situation, and Collier said that he would move the pallets

³ This statement does not say anything about what occurred that day in Orozco’s office. Escobedo testified that he didn’t think that he had to include it because Orozco and Aguirre witnessed what occurred. He also did not mention the incident in the dining room; he testified that he didn’t feel that he had to, because many other people, including a supervisor, overheard what Collier said.

⁴ In this statement, Escobedo says that at the meeting in Orozco’s office, he stated: “I get upset and I told him that I was not afraid of him and I want to punch him for being fresh.”

when his break was over. Escobedo said, leaning toward Collier, that he knew how “those people,” the Boricuas, are and “...he can fix this problem outside and punch him in the face.” At that point, Aguirre moved to stand between the two of them and Orozco stood up from her chair and told them to be quiet and to stop arguing. When the situation quieted down, Aguirre left the office and she told Collier to return to the area, to put the pallets back to where they were supposed to be, to return to work, and not to park in that area again. At that point, Collier and Escobedo “were calm” and left her office at the same time.

Orozco testified that a few minutes after leaving his office Collier returned to her office, crying and saying that he wanted to fill out a report about what happened in the office. She gave him some papers to fill out a statement and told him that he could do it in Spanish. She did not tell him what to write, only to write what happened in the office. After he finished writing the statement⁵ she brought it to Marilyn Belo, at the HR office at the facility, and was told that since she had a report from Collier, she had to get one from Escobedo and Aguirre, as well. She went to them and asked them separately to fill out a report on what had occurred in the office and each came to her office, separately, and prepared a statement⁶. When they completed the statements, she read them and gave them to the Belo, telling her what had happened in her office and that she did not agree with Escobedo’s statement because he did not mention that he threatened to punch Collier in the face and fix it outside. Orozco testified that she does not remember Collier telling her that Segundo was the employee handing out Union cards, as he says in the statement that he gave to her.

Collier testified that on April 18, at about 9:20, he drove his forklift to the “cafeteria,” what Escobedo referred to as the inside dining room. He testified that he always parks in front of the cafeteria, like most of the other employees, but on that day a pallet was there and he “grabbed” the pallet and moved it to the other side. Escobedo approached him and told him to return the pallet to where it had been, but Collier “...thought that he was joking around. Many times before there had been joking going around between us.” Collier said that he would put it back after the break. Then another employee started yelling that he should put it back and, jokingly, said that he should have to put money in the parking meter because it seemed to be his exclusive parking space, and they agreed that he would put it back after the break. While he was in the cafeteria, the employees continued to make the same jokes about his exclusive parking spot and another employee told him not to pay attention to them, and he said that he was going to ignore them. Before he had completed his break, he heard Orozco page him over the loud speaker and as he was leaving the cafeteria he said, apparently to no one in particular, “I’m not afraid of anyone, I’ll just go and tell Diana what happened.” When he got to the office, she asked him about moving the pallet and he said that he never previously had a problem with anybody and the employees were joking about the situation. She told him that in order to prevent a repeat of the situation, he should not park in that spot again, and he agreed. As Collier was leaving the office, he met Aguirre, who told him to return to Orozco’s office. At the same time, he saw Escobedo coming into the office, “with an attitude,” talking about the Boricuas⁷, and saying, “I’m not afraid of you, and we’ll go outside.” At that point, Aguirre moved between them and

⁵ Collier’s statement, dated April 18, says that Escobedo “...told me we will take care of this outside...I told Diana that if he gets rough I will call the police. I am going to file a report with the Perth Amboy police and I hope they can help me.” However, this statement also says: “I didn’t tell her that I was upset or afraid of Segundo. I’m not afraid of anyone. I’ve been through too much in my life to be afraid of another person.” His statement also says: “I told Diana that Segundo was the one handing out Union cards...”

⁶ The statement written by Aguirre does not state that Escobedo used the term “Boricuas.”

⁷ Collier testified that he does not believe that the term Boricuas has a negative meaning.

Escobedo again referred to the Boricuas and said that they can go outside and fight. Collier told him to take it easy, he was saying all these things over a pallet that he moved, and that he should calm down and talk like civilized people. Orozco told them to calm down, which they did and Collier left the office and returned to his machine. At that time, he "...felt bad and I started to get really nervous, uncomfortable...I parked the machine and I started to cry, because I was so upset and because I was so nervous. And I told Diana I can't stand any more over here. I'm going to go home." He said that the situation with the pallet wasn't a reason for Escobedo to insult him, and, "I was so upset that I told them about the union. I said that he was involved with the union. And I also said that I signed the card. That he gave it to me and I signed it." Collier then said that he would fill out a report about the incident and he filled out the statement in Orozco's office, and gave it to her.

Ana Schnauffer has been employed at the facility as the Senior HR Manager at the facility, testified that she makes the final determination on all discipline at the facility after reviewing all data presented to her. The first she learned of the April 18 incident was on the same day from the HR Manager, Nesta Rivera who told her that one associate had threatened another. After Rivera had gathered additional evidence, the three statements, she reviewed them as well as the statement that Escobedo gave, as a result of the request of the LP (Loss Prevention) Manager, Eva Alvarez on the following day. In addition, she spoke to Alvarez about the situation. On April 19, she decided that Escobedo should be terminated:

My basis was that I had two—one manager present during the threat, an associate whose statement says that he was threatened by another associate and then after speaking with the LP Manager, also stated that Mr. Escobedo had stated to her that he in fact wanted to punch Christian Collier in the face. So my decision was based on those witnesses.

She testified that the Respondent has a workplace violence policy that is set forth in its Employee Handbook, and that it is her responsibility to be sure that there is a safe work environment for all the associates, and "...that's why that determination was made that Mr. Escobedo would be separated." She testified that as part of her investigation, she read Collier's statement which stated that Escobedo was the one handing out Union cards, but that fact did not affect her decision to terminate him, nor did Escobedo's feeling about the Union, or his Union activity. In addition, she was "concerned" about what she felt was an ethnic slur, when Escobedo allegedly referred to Collier as a Boricuas, as there are many different nationalities employed at the facility. However, Escobedo was terminated because of the threat, not the ethnic slur.

There was also some testimony about other employees who were terminated based upon the Respondent's workplace violence policy. Schnauffer testified that Respondent's Workplace Prevention Policy has a "zero tolerance" toward workplace violence, "whether it be physical or verbally," and she testified to some examples of employees who were terminated based upon this policy. Timmy Rodriguez was terminated in April 2011 for threatening to come in and kill his supervisor and Rafael Valesquez was terminated for making a "tape ball" and throwing it at another employee's head, causing him harm. Another employee, Disney Santos, was terminated in November 2010 after he threatened his manager⁸ who asked him to punch in at his designated work area, and Guillermo Berra was terminated in February 2010 for being hostile to a supervisor and saying that he wanted to punch him. Jose Maldonado was terminated in January 2010 for calling his supervisor a faggot and using other inappropriate

⁸ The "threat" was: "If you have an itch with Cubans, I can scratch it outside."

language toward him, and Ramon Ortiz was terminated in February 2010 for threatening to punch out the teeth of a fellow employee. She testified that she is unaware of any employee at the facility who engaged in a threat of violence and was not terminated. Counsel for the General Counsel introduced into evidence a note to the file dated September 2010 regarding an employee who was upset that the lock on his tool box had been cut. As a result, he told a supervisor, “I’m going to come in here with a bat and start taking heads.” He was not terminated as a result of this statement. Schnauffer could not recollect much of the incident except for the lock having been broken on the employee’s tool box.

III. Analysis

It is initially alleged that the Respondent, by Orozco, interrogated Escobedo about his Union activities, as well as the Union activities of his fellow employees. Escobedo testified that on about February 20 he was approached by Orozco and Rangel, who had a blank Union authorization card with an “X” marked across it. Orozco asked him if he recognized the card or if he was giving out the cards; he did not respond. Rangel then told him that Silverman wanted to know who was involved with the Union and to look at the card and to tell his manager if he wanted to talk about it. Orozco testified that all managers had extensive training on what they could and could not do during the Union campaign, and the “don’ts” included that they were not to ask employees questions about the Union. She showed him the Union authorization card, and he said that he didn’t have time for it. She did not ask him if he recognized the card or whether he was distributing the card. Rangel did not testify. Although I found neither Escobedo nor Orozco to be totally credible, I found Escobedo to be more credible than Orozco. While there are some discrepancies between some portions of Escobedo’s testimony and his affidavits about his conversations with superiors about the Union that is not surprising as these conversations were fairly similar. On the other hand, I found that Orozco’s testimony was, at times, conveniently selective and forgetful, most notably her testimony that she does not recollect Collier telling her that Escobedo was the employee who was handing out Union cards to the employees. Considering the “extensive” training of “dos and don’ts” that she testified that all the managers participated in, it appears to me that this is a fact that she would clearly remember. I therefore credit Escobedo’s testimony over that of Orozco, and find that she asked him if he recognized the Union card or if he was giving them out.

The test for interrogations or discussions of this nature is whether the supervisor’s statements “...would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights, and not a subjective test having to do with whether the employee in question *was actually intimidated*.” [Emphasis supplied] *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1228 (2000). Although there are no other allegations of Section 8(a)(1) conduct herein and Escobedo, apparently, continued to distribute Union authorization cards after this conversation, I find that by asking him if he recognized the card or was distributing them, he could reasonably be coerced by such a question, and that it therefore violated Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984), *Medcare Associates, Inc.*, 330 NLRB 935 (2000).

The remaining issue relates to the discharge of Escobedo on April 19. Was it caused by his activities in support of the Union, as alleged by Counsel for the General Counsel, or did it result from his threat to Collier while in Orozco’s office on April 18, as the Respondent defends? This issue is to be judged by the guidelines formulated in *Wright Line*, 251 NLRB 1083 (1980). Under that test, the initial issue is whether Counsel for the General Counsel has made a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the Respondent’s decision to terminate Escobedo. If that has been established, the burden then falls to the Respondent to demonstrate that it would have terminated him even in the

absence of his protected conduct. In order for Counsel for the General Counsel to satisfy his initial burden herein, he must establish that the Respondent was aware of Escobedo's card solicitation activity and acted upon that knowledge by terminating him. Although there is no evidence of Union animus other than the single Section 8(a)(1) violation discussed *supra*, there is enough credible evidence herein to establish that his card solicitations was a motivating factor in his termination. The "threat"⁹ that Escobedo directed at Collier was made in Orozco's office in the presence of Orozco and Aguirre. Yet, at the conclusion of that meeting, Orozco let both Escobedo and Collier leave the office together and return to work. It was not until Collier returned to Orozco's office, allegedly crying, and told Orozco that Escobedo was involved with the Union and gave him a Union card to sign, that the Respondent determined that Escobedo had to be terminated because of the threat that he made to Collier. The timing thus clearly indicates that it was not the threat that caused the discharge; rather, it was the knowledge of Escobedo's Union activity that caused it. Additionally, I found that the Respondent did not satisfactorily explain why Escobedo was required to give a second statement to its Loss Prevention Department on April 19, right before being terminated. He had already given a statement to Orozco, and she had discussed it with Schnauffer. Why was this second statement necessary, other than to entrap Escobedo? I therefore find that Counsel for the General Counsel has satisfied his initial burden herein.

The remaining issue is whether the Respondent has satisfied its burden that it would have terminated Escobedo even absent his Union activity. I find that it has not. As Aguirre did not testify, as between Escobedo, Collier and Orozco, I credit the testimony of Escobedo. I have previously discredited Orozco, principally because of her incredible testimony that she does not remember Collier telling her that Escobedo had been soliciting authorization cards for the Union, and I found Collier's testimony often contradictory and confusing. I therefore credit Escobedo's testimony that, after telling Orozco and Aguirre what Collier had said and done, he said, "This man is provoking me to punch him," and Collier said that he wasn't afraid of him. While Escobedo's statement could lead to violence, it is not a direct threat; rather he was saying what he felt, not what he was going to do. Prior to Collier and Escobedo leaving her office, she told Collier that she didn't want to know anymore about it and that he was to fix the merchandise and move his forklift and, after he left, she told Escobedo to be patient with him because he was trying to rehabilitate himself. These are not the type of statements that are made to an employee who is going to be fired, unless there is an intervening fact, such as learning that he was soliciting authorization cards for the Union, as happened herein. I therefore find that the Respondent has not satisfied its burden under *Wright Line*, and that by terminating Escobedo on April 19, the Respondent violated Section 8(a)(1)(3) of the Act.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by interrogating Escobedo about his Union activities.

3. The Respondent violated Section 8(a)(1)(3) of the Act by terminating Segundo

⁹ I certainly do not mean by my Decision herein to minimize the necessity and importance of rules against threats and Zero Tolerance rules regarding threats, especially in a large industrial environment. However, in this situation, I find that Escobedo's statement was not meant or initially viewed as a direct threat, and that he was not terminated for that statement.

Escobedo on about April 19, 2012 in retaliation for his Union activities.

The Remedy

The Respondent having discriminatorily discharged an Escobedo, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F. 3d 1137 (D.C. Cir. 2011). I shall also order the Respondent to file a special report with the Social Security Administration allocating Escobedo's backpay to the appropriate calendar quarters and to compensate him for any adverse income tax consequences of receiving his backpay in one lump sum. Having found that the Respondent also engaged in unlawful interrogation, in violation of Section 8(a)(1) of the Act, I recommend that it be ordered to cease and desist therefrom, and to post a Notice to this effect.

Upon the foregoing findings of fact, conclusions of law and on the entire record, I hereby issue the following recommended¹⁰

ORDER

The Respondent, Bed Bath & Beyond, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Interrogating employees regarding their activities on behalf of Local 888, UFCW, the Union, or any other labor organization.

(b). Discharging or otherwise discriminating against its employees because of their activities on behalf of the Union, or any other labor organization.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights as guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Segundo Escobedo full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in the remedy section of this decision.

(b) File a special report with the Social Security Administration allocating Escobedo's backpay to the appropriate calendar quarters and compensate him for any adverse income tax consequences of receiving his backpay in one lump sum, as prescribed in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Escobedo, and within 3 days thereafter notify him, in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Port Reading, New Jersey copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 8, 2013

Joel P. Biblowitz
Administrative Law Judge

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT question you about your activities on behalf of Local 888, UFCW ("the Union"), or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union, or any other union and **WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL Segundo Escobedo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and **WE WILL** make him whole for any loss of earnings and other benefits resulting from his discharge, together with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the discharge of Escobedo, and **WE WILL**, within 3 days thereafter, notify him that this has been done and that the discharge will not be used against him in any way.

BED BATH & BEYOND, INC.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

20 Washington Place, 5th Floor

Newark, New Jersey 07102-3110

Hours: 8:30 a.m. to 5 p.m.

973-645-2100.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.